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10/629,991	07/30/2003	Cheree L. B. Stevens	ADV12 P-305D	3726

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT PAPER NUMBER

1761

DATE MAILED: 10/20/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/629,991

Applicant(s)

STEVENS ET AL.

Examiner

Kelly Mahafkey

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 July 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-23 and 35-42 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-23 and 35-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_.

### **DETAILED ACTION**

Amendments made July 26, 2006 have been entered.

Claims 1-23 and 35-42 are pending.

### ***Election/Restrictions***

Claims 23-34 have been withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on August 7, 2006.

### ***Claim Rejections - 35 USC § 112***

The previous rejections regarding 112 rejections have been withdrawn in light of applicant's amendments.

### ***Claim Rejections - 35 USC § 102***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by Earle et al. (US 45045032). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 3-7, 11, 14, 17, 18, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge (US 3723132) in view of Baur et al. (WO 94/21143). The references and rejection are incorporated herein and as cited in the office action

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mailed January 26, 2006. Regarding the new limitation as recited in claim 3, Hodge, Column 2 lines 11-14, teaches that the pastry product is composed of a low moisture content dough.

Claims 2, 8, 9, and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Hodge and Baur, further in view of LrdRas (<http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html>). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Hodge and Baur and LrdRas, further in view of Higgins et al. (US 5976607). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 7, 10, 15, 17, 20, and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Hodge and Baur and LrdRas and Higgins, further in view of Gonzalez-Sanz (US 5439697). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 12, 13, and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Hodge and Baur and LrdRas and Higgins and in Gonzalez-Sanz, further in view of Lenchin et al. (US 4510166). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 35, 37, 39, and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hodge (US 3723132) in view of the combination of Baur et al. (WO 94/21143) and LrdRas (<http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html>) and Gonzalez-Sanz (US 5439697). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 36, 38, 40, and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Hodge and Baur and LrdRas and Gonzalez-Sanz, further in view of Lenchin et al. (US 4510166). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

*A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.*

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-23 and 35-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 5-9, 11, 14, 15, and 17-19 of copending Application No. 10682673 (673). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 1-23 and 35-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 2, 6-8, 12-17, 23-28, and 47-53 of copending Application No. 10682672 (672). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 1-23 and 25-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 40, 43, 46, 49, and 50 of copending Application No. 10170964 (964) and in view of Baur et al. (WO 94/21143). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

### ***Response to Arguments***

Applicant's arguments filed July 28, 2006 have been fully considered but they are not persuasive.

Regarding the 102 rejection over Earle, applicant argues that the composition as taught by Earle is not clear because it may include a filler and/or carrier material. Applicant also argues that the gelling agents in the composition as taught by Earle would produce a cloudy coating. Regarding applicant's argument that the coating as taught by Earle is not clear because it may include a filler and/or carrier material, this is not convincing, since Earle teaches that the filler and/or carrier material is optional and as such, the recited component is not required and would not make the composition unclear. Regarding applicant's argument that the coating as taught by Earle is cloudy, since cloudy does not mean entirely unclear, it is reasonable that the composition as taught by Earle could be substantially clear. Furthermore, applicant is referred to Earle, Column 5 lines 11-13, in which Earle teaches that there is no difference in the

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appearance of the product when the food coating as taught by Earle is applied to a food product, thus it would be inherent that the food coating as taught by Earle is *at least substantially* clear.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

- Applicant argues, that there is no motivation to combine Hodge and Baur.

Applicant is referred to the previous office action page 5; Hodge, Column 1 lines 20-45 and Column 2 lines 11-31, teaches a fried food product which is intended to be reheated and will possess the texture and mouth feel of a freshly made product; Baur, Background, Page 1 lines 35-37, Page 2 lines 1-8, and Example 8, teaches of a coating composition which improves the texture in fried foods which upon reheating. Since both references are focused on the maintenance of the texture of the food product, it would have been obvious to utilize both methods as disclosed, in order ensure a final product with desired textural characteristics. Furthermore, applicant argues that the coating composition as taught by Baur does not produce the claimed invention when applied to the food product as taught by Hodge, because a

coating composition which contains wheat flour cannot be clear and successfully adhere when applied to a wheat based substrate. This argument is not convincing because it is unclear as to where a wheat-based substrate is required, and because the pastry product as taught by Hodge requires flour, and although preferred, the product is not necessarily composed of wheat flour.

- Applicant argues that there is no motivation to combine Lenchin with the references of record. Applicant is referred to the combination of Hodge and Baur, page 5 Baur, in which Baur teaches of dextrin but does not teach of a solubility level of such dextrin, thus one would have been motivated to look to the food coating art for a teaching of dextrin; Lenchin, Abstract, Column 8 lines 27-35 and Table II, in which Lenchin teaches that different types of dextrin provide different gel textures in food coating compositions. Thus, it would have been obvious to choose a dextrin with a specific solubility level depending on the desired coating texture (i.e. the greater solubility, the more firm the texture of the coating composition).

Applicant argues, that there is non-obviousness in regards to the combination of LrdRas.

- Applicant argues that LrdRas has not been established as prior art since it is unclear as to when the reference was made available to the public. First the reference contains dates at which the knowledge in the reference was known before the time the current invention was made. Second, through



<http://web.archive.org>, the examiner has provided further evidence that further supports that the reference was made available to the public before the time at which the current invention was made.

- Applicant argues that, even if LrdRas teaches starch equivalents, LrdRas does not teach those modified starch equivalents, however, it would be expected that starch equivalents would be at least similar to the same modified starch equivalents.
- Applicant argues that modified wheat starch and modified cornstarch are not *identical*. However, applicant is referred to the previous office action, in which it is stated that modified wheat starch and modified cornstarch are *similar*. Applicant is also referred to the specification of application's copending application, 10/682673, in which applicant discloses of a composition similar to that of the present application, and applicant discloses that modified cornstarch may be substituted for modified wheat starch (paragraph 0020).
- Applicant argues to substitute wheat starch for a cornstarch substitute would be undesirable, however, there is motivation for the substitution. As stated in the previous office action, because the wheat based starch can be used in the same way and produce similar results as the corn starch, and for economic reason motivation is present for such a substitution. Applicant is referred to the previous office action paragraphs 17-20.
- Applicant argues that LrdRas does not possess any skill in the art. This is not convincing. LrdRas supports the knowledge taught by experimental results.

The experiments (i.e. the substitution of wheat starch for cornstarch) are experiments that would have reasonably been expected to occur within the knowledge of one of ordinary skill in the art.

Applicant argues that Higgins does not disclose of an amount of slurry pick up on the coated product. Applicant is referred to Higgins, abstract, which teaches a 20-90% of a coating composition is mixed with water to be applied to the product. Higgins, Column 7 lines 45-49, teaches that the coating composition is applied through an aqueous waterfall on a conveyor, thus, at best, the top and sides of the product would be coated, therefore one of ordinary skill in the art would expect up to about 75% of the product would be covered by the coating and water composition when applied through an aqueous waterfall, thus the coating composition would be on the product in an amount of 0-67%. Note: The amount of "slurry pick up" on the substrate has been interpreted to be the amount of the coating composition coated onto the substrate.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In this case, applicant is referred to the response to arguments in regards to Gonzalez-Sanz (below) and Lenchin (below).

In response to applicant's argument that Gonzalez-Sanz is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, the reference is pertinent to the particular problem (i.e. reducing moisture loss of baked products) with which the applicant was concerned.

In response to applicant's argument that the examiner has combined an excessive number of references, reliance on a large number of references in a rejection does not, without more, weigh against the obviousness of the claimed invention. See *In re Gorman*, 933 F.2d 982, 18 USPQ2d 1885 (Fed. Cir. 1991).

Applicant's arguments of traverse over the non-statutory obvious type double patenting rejections are not convincing, as applicant has provided no basis or arguments in support of the traverse.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

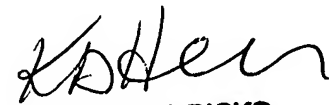
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Kelly Mahafkey  
Examiner  
Art Unit 1761



  
**KEITH HENDRICKS**  
**PRIMARY EXAMINER**